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Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the human rights of migrants, François Crépeau, on his mission to Australia and the regional processing centres in Nauru from 1 to 18 November 2016.

The Special Rapporteur held consultations with officials of the Government of Australia, migrants, civil society organizations and international organizations. He observed that some of the migration policies of Australia have increasingly eroded the human rights of migrants, in contravention of the country's international human rights and humanitarian obligations. Australia must develop and implement a human rights-based approach to migration and border management, ensuring that the rights of migrants, including irregular migrants, are always the first consideration.

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Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*

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* Circulated in the language of submission only.

I. Introduction

1. From 1 to 18 November 2016, the Special Rapporteur on the human rights of migrants, François Crépeau, conducted an official visit to Australia. The visit was undertaken to assess the migration programmes, policies and laws recently developed by the Australian authorities.

2. During his visit to Australia, the Special Rapporteur met with a range of officials from the Federal Government and state governments, with civil society organizations, trade unions, the Australian Human Rights Commission, international organizations, and migrants themselves, to discuss the complex management of the country's borders.

3. The Special Rapporteur held meetings in Canberra, Melbourne, Perth, Brisbane and Sydney. He visited the following detention centres: Yongah Hill Immigration Detention Centre, Maribyrnong Immigration Detention Centre, Melbourne Immigration Transit Accommodation, Brisbane Immigration Transit Accommodation Centre and Villawood Immigration Detention Centre. He also visited the regional processing centres in Nauru.

4. The Special Rapporteur expresses his appreciation to the Government of Australia for the support provided throughout the visit.

II. General background on migration: a brief overview

5. From 1948 to 1978, Australia received more than 2 million people from Europe. The driving force behind immigration policy for the first two decades after the Second World War was known as "populate or perish". In line with the Immigration Restriction Act 1901, assimilation was expected of all new arrivals. Economic growth and skills increasingly became the key drivers.

6. In 1972 the Government of Australia abolished the White Australia policy, and in 1975 it introduced new immigration laws restricting the number of unskilled workers allowed into the country. In the late 1970s, Australia introduced a system that gave objectivity by placing weight on factors such as family ties, and occupational and language skills. With the changes in the immigration mix, settlement services were reviewed, with increased commitment to a non-discriminatory and managed immigration programme.

7. In 2001, the Norwegian cargo ship MV Tampa was denied entry to Australian waters after having rescued 438 migrants from a fishing boat. The Government of Australia refused disembarkation.

8. The Tampa crisis provoked discussion on the need for legal changes to determine how Australia responded to unauthorized boat arrivals. The Border Protection (Validation and Enforcement Powers) Act 2001 represented a shift in power away from legal systems to military and government officials and gave the Government power to turn vessels away.

9. Furthermore, the crisis dramatically influenced Australian domestic politics, with parties winning votes for their stance on tough border controls.

10. Following the "Tampa crisis", the Government of Australia introduced a series of legislative measures known as the Pacific Solution. Under that policy, asylum seekers who arrived by boat were transferred to offshore processing centres in Nauru and on Manus Island in Papua New Guinea, where they were detained while their asylum claims were processed. Australia turned away many "boat people" over a period of several months.

11. In July 2011, Australia signed an arrangement with Malaysia in which it was stipulated that 800 asylum seekers from Christmas Island would be sent "to the back of the queue" in Malaysian detention centres for processing. In exchange, Malaysia would send 4,000 certified refugees to Australia. The Office of the United Nations High Commissioner for Refugees (UNHCR), though not a signatory to the agreement, was to help facilitate it. The deal was budgeted to cost Australia $A292 million, with $A216 million of that amount covering the cost of resettling refugees in Australia. Lawyers arguing against the agreement stated that Malaysia was not a signatory to the Convention Relating to the Status of Refugees, of 1951, and could not guarantee the protection of asylum seekers sent from

Australia, including unaccompanied children. On 31 August 2014, the High Court of Australia held that the Malaysia deal was in violation of the Migration Act and that the Minister for Immigration and Border Protection had no power to remove from Australia asylum seekers whose claims for protection had not been determined. The decision raised questions over the whole practice of offshore processing.

12. In June 2012, the Expert Panel on Asylum Seekers was established to examine the way forward in responding to boat arrivals. In August 2012, the panel recommended establishing offshore centres and increasing the intake of refugees. Also in August 2012, the Government announced the reopening of the regional processing centres, and the reinstatement of third-country processing for asylum seekers arriving unauthorized, by boat, after 13 August 2012. Australia went on to sign agreements with Papua New Guinea and Nauru to conduct offshore processing.

13. In October 2013, the Government adopted a new policy of naval vessels intercepting boats of migrants and directing them back to the country from which the vessel had departed, which was followed by a dramatic reduction in arrivals.

III. Normative and legal framework on migration and border management

A. International framework

14. Australia is party to eight of the nine core international human rights treaties. It has made reservations to the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. It has signed the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and has ratified the first two optional protocols to the Convention on the Rights of the Child, and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

15. Australia has also ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air. It is party to the Convention relating to the Status of Stateless Persons, of 1954, the Convention on the Reduction of Statelessness, of 1961, and the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

16. Australia has ratified the Convention on the Law of the Sea, which establishes the structure of maritime territory and the rights and obligations of States. It has acceded to the International Convention on Maritime Search and Rescue, which establishes State duties in relation to establishing search and rescue services, and the International Convention for the Safety of Life at Sea, which builds on the norms that States and other actors have an explicit duty to meet for those in distress at sea.

B. Regional framework

17. Australia is a member of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime. In March 2016, the sixth Bali Process Ministerial Conference led to the endorsement of a declaration which acknowledges the growing scale and complexity of irregular migration challenges, both within and outside the Asia-Pacific region, and supports measures that would contribute to comprehensive long-term strategies addressing smuggling and human trafficking, as well as reducing migrant exploitation by expanding safe, legal and affordable migration pathways.

C. Bilateral agreements

18. Australia has signed the agreements outlined in the paragraphs below:

19. A memorandum of understanding between the Government of the Islamic Republic of Afghanistan and UNHCR on migration and humanitarian cooperation (on 17 January 2011) to return Afghans — forcibly or voluntarily.

20. The Regional Resettlement Arrangement with the Government of Papua New Guinea (on 19 July 2013), whereby asylum seekers — currently single males over 18 years of age — arriving irregularly by boat are transferred to Papua New Guinea for processing, refugee determination and resettlement.

21. A memorandum of understanding with Nauru, in respect of single males over 18 years of age, families, women and unaccompanied minors (on 3 August 2013), for processing, refugee determination and resettlement.

22. A memorandum of understanding with Cambodia relating to the settlement of refugees in Cambodia (on 26 September 2014). Australia allocated $A15.5 million to settle refugees from Nauru in Cambodia, with the service provider being the International Organization for Migration. Refugees on Nauru were offered payments of up to $A15,000 as part of the resettlement offer. By November 2015, five refugees had taken up this offer. Reportedly, all five refugees decided to leave Cambodia due to the dire conditions they faced there.

D. National legal, institutional and policy framework

1. Legal framework

Constitution

23. The Australian Constitution came into effect on 1 January 1901. The Constitution protects five explicit individual rights, such as the right to trial by jury (sect. 80), the right to freedom of religion (sect. 116), and prohibition of discrimination on the basis of State of residency (sect. 117).

Legislation

24. There are many legal standards relating to migrants. The most significant pieces of legislation are:

(a) The Migration Act 1958, which contains the country's immigration regulatory framework. It covers control of arrivals and the presence of non-citizens, detention, decision-making processes for granting, refusing or cancelling visas, criminal offences for people-smuggling and other migration-related offences, and a review system for challenging visa decisions. Since June 2013, all non-citizens who arrive anywhere in Australia by sea without a valid visa are unable to make a valid visa application unless the Minister for Immigration and Border Protection lifts the visa application bar. If such a person makes a protection claim, he or she is subject to regional processing arrangements whereby his or her claim is assessed in a regional processing country. This process of ministerial intervention is non-compellable and non-reviewable. In effect, asylum seekers in offshore places are barred from the refugee status determination system that applies on the Australian mainland. The Act was amended in 2005 to affirm that asylum-seeking children should only be detained as a measure of last resort and that children should no longer be detained in immigration detention centres.

(b) The Migration Reform Act 1992, which introduced a mandatory immigration detention system for all irregular migrants. The 273-day limit in detention was removed. A system of bridging visas was also introduced to allow persons to be released from immigration detention in certain circumstances.

(c) The Migration Regulations 1994, which specifies additional criteria that must be met at the time the decision is made to grant a visa, including in relation to health, character and security. Adults must sign a "values statement".

(d) The Migration Amendment (Employer Sanctions) Act 2007, which amended the Migration Act and prohibits knowingly or recklessly employing or referring for work (either paid or unpaid) a person who does not have a valid visa or who is working in breach of his or her visa conditions. The Act includes aggravated offences, where a person is being exploited through slavery or slavery-like conditions, servitude, forced labour, forced marriage and/or debt bondage.

(e) The Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012, which amended the Migration Act regarding taking offshore entry persons to another country. It also clarifies that guardianship obligations do not affect the operation of the Migration Act, particularly in relation to the making and implementation of any decision to remove, deport or take a non-citizen child from Australia. It establishes mandatory detention for all asylum seekers entering Australia at an "excised offshore place".

(f) The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014:

(i) *Expansion of maritime powers*: The Minister for Immigration and Border Protection has powers to detain people at sea (both within Australian waters and on the high seas) and to transfer them to any country or a vessel of another country — even if Australia does not have that country's consent to do so. The Act establishes that "an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 (of the Migration Act 1958) arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen" (arts. 2 and 3). The exercise of these powers is not subject to judicial review or the rules of natural justice and certain determinations are not subject to public scrutiny or parliamentary scrutiny.

(ii) *Reintroduction of temporary protection visas*: Asylum seekers who arrive in Australia irregularly are not eligible for permanent protection visas. If they are found to be refugees, they will instead be granted a temporary protection visa, which will be valid for up to three years, after which time they must reapply for protection and have their claims reassessed. Holders of temporary protection visas do not have the same entitlements as holders of permanent protection visas.

(iii) *Introduction of the fast-tracking process*: This process concerns all unauthorized maritime arrivals who arrived irregularly by boat between 13 August 2012 and 1 January 2014 and were not taken to Nauru or Papua New Guinea for offshore processing, provided that the Minister has allowed them to apply for a protection visa and that the person has made a valid application. The Minister can also extend the definition to other classes of asylum seekers, by a legislative instrument. The Act divides asylum seekers into three groups, with a different process for each. Two of these groups — fast-track applicants and excluded fast-track applicants — are subject to fast-tracking in order to determine whether they will be granted a temporary protection visa. The third group comprises asylum seekers who have arrived in Australia on a valid visa and who continue to have access to the ordinary refugee status determination process to be granted a permanent protection visa. Excluded fast-track applicants will not have access to any form of merits review, and they will only have access to the more limited form of judicial review by the courts. The Minister can also expand the grounds on which someone may be designated an excluded fast-track applicant, through a legislative instrument. The Minister may, however, allow specified excluded fast-track applicants to have access to the same review process as fast-track applicants, through a legislative instrument. Fast-track applicants do not have access to the Refugee Review Tribunal. Unlike the Refugee Review Tribunal process, fast-track applicants will not have an automatic right of review, but may be referred to the Immigration Assessment Authority by the Minister. The Immigration Assessment

Authority will instead conduct an appeal of the decision only on the basis of the existing documents before the Department of Immigration and Border Protection. The Immigration Assessment Authority does not conduct hearings and can only consider new information in "exceptional circumstances", and if either the new information could not have been provided at the time of the initial decision, or it is "credible personal information" which, had it been known, may have affected the initial consideration of the claim. The Refugee Review Tribunal has been superseded by the Migration and Refugee Division of the Administrative Appeals Tribunal. A merits review by the Migration and Refugee Division requires the applicant to apply for it (as did the Refugee Review Tribunal). It is not automatic.

(iv) *Introduction of safe haven enterprise visas*: The safe haven enterprise visa is valid for up to five years, during which time the visa holder must work or study in a specified regional area. Asylum seekers who arrive in Australia irregularly (whether by boat or by plane), who were not immigration-cleared upon their last arrival in Australia and/or who previously held temporary visas are eligible to apply for a safe haven enterprise visa. If a holder of a safe haven enterprise visa does not receive any social security benefits for a period totalling 42 months (which need not be continuous) and/or is engaged in employment or full-time study in the specified regional area, he or she may be eligible to apply for a range of general migration visas, such as family, skilled or student visas — but not humanitarian visas.

(v) *Reclassification of children of asylum seekers who arrived by boat*: Since December 2014, children born in Australia or a "regional processing country" (Nauru or Papua New Guinea) whose parents arrived as asylum seekers by boat are now considered to be "transitory persons" and "unauthorized maritime arrivals". Consequently, they are now subject to the same policies and restrictions that apply to asylum seekers who arrived by boat, including offshore processing and denial of access to permanent protection in Australia. This change applies retrospectively, to children who were born before the "legacy caseload" act came into effect in December 2014.

(g) The Australian Border Force Act 2015, in which it is stated that an "entrusted person" can be jailed for two years for disclosing "protected information". An "entrusted person" is the Secretary of the Department of Immigration and Border Protection, the Australian Border Force Commissioner and all staff of the Department of Immigration and Border Protection, and may include contractors, such as those working in immigration detention centres. The definition of "protected information" encompasses any information obtained by a Department of Immigration and Border Protection worker in his or her capacity as a Department of Immigration and Border Protection worker. Unauthorized disclosure is only permissible if it is "necessary to prevent or lessen a serious threat to the life or health of an individual" and the disclosure is "for the purposes of preventing or lessening that threat" (sect. 48). Section 42 sets out a range of circumstances where disclosure will not be an offence, including where the disclosure is required or authorized by law.

2. Refugee and Humanitarian Programme

25. The Refugee and Humanitarian Programme has two important functions:

Onshore protection

26. The onshore component of the Refugee and Humanitarian Programme is aimed at providing options for people who are in Australia and wish to apply for protection.

Offshore resettlement

27. The offshore resettlement component comprises two categories of permanent visas. These are:

(a) The refugee visa, for people who are subject to persecution in their home country, who are typically outside their home country and are in need of resettlement.

(b) The Special Humanitarian Programme visa, for people outside their home country who are subject to substantial discrimination amounting to a gross violation of their human rights in their home country, and immediate family members of persons who have been granted protection in Australia. Applications for entry under the Special Humanitarian Programme must be supported by a proposer who is an Australian citizen or permanent resident or an eligible New Zealand citizen, or by an organization that is based in Australia.

28. People who arrived as unauthorized maritime arrivals on or after 13 August 2012 are no longer eligible to propose their family members under the Special Humanitarian Programme. People in those circumstances can apply under the family stream of the Migration Programme.

3. Relevant government agencies

29. Since 1 July 2015, the Australian Customs and Border Protection Service has been consolidated into the Department of Immigration and Border Protection. The Australian Border Force, a single front-line operational border agency, was established within the Department. The Australian Border Force draws together the operational border, investigations, compliance, detention and enforcement functions of the two previously separate agencies. Policy, regulatory and corporate functions are combined within the broader department.

30. The Operation Sovereign Borders Joint Agency Task Force (as part of Operation Sovereign Borders) was established to combat people-smuggling and to protect the country's borders.

31. The Australian Human Rights Commission was established in 1986. The Commission examines complaints coming from regional processing centres in Nauru and Papua New Guinea, but it cannot visit either country. In December 2014, the Commission released a report entitled "The forgotten children", on children in onshore and offshore immigration detention. In March 2015, the Secretary of the Department of Immigration and Border Protection established the Child Protection Panel to provide independent advice on issues pertaining to the well-being and protection of children in immigration detention and in regional processing centres. In May 2016, the Department of Immigration and Border Protection received the panel's final report and accepted all the recommendations in the report. The Department of Immigration and Border Protection will reconvene the panel in late 2017 to review the Department's implementation of the panel's recommendations.

IV. Border management

32. The migration policies of Australia give many positive examples, such as the country's resettlement programme, granting humanitarian protection to a high number of refugees with the objective of increasing the number of visas issued to 18,750 per year from 2018, and assisting them in their integration process with generous and well thought-through integration programmes. The welcoming of 12,000 Syrian and Iraqi refugees is also a positive contribution to the global response to refugee movements. The Special Rapporteur received information about the country's huge temporary migration programme, which includes 300,000 students, 200,000 people on working holiday visas, and up to 150,000 visas for skilled temporary workers. He was informed that at any one time, there were approximately 2 million people in the country who held temporary visas. Many of these visas include pathways to permanent residence and citizenship.

33. In contrast to its exemplary resettlement policies, the strong focus on securitization and punishment blemishes the country's good human rights record. The Special Rapporteur observed that some of the country's migration policies have increasingly eroded the human rights of migrants, in contravention of its international human rights and humanitarian obligations. For all the progress made by Australia in all other areas of life, several of its migration policies and laws are regressive and fall behind international standards.

A. A punitive approach to unauthorized maritime arrivals

34. National laws must be brought into line with the country's international obligations. In this regard, the Special Rapporteur refers specifically to section 197C of the Migration Act, in which it is established that "an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 (of the Migration Act 1958) arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen". He remains deeply concerned that this law is a violation of the international principle of non-refoulement, as not to carry out an individual assessment which offers a person the opportunity to submit an asylum claim is in contravention of the country's international human rights and humanitarian obligations. Australia must guarantee that all asylum claims are thoroughly examined through an individual assessment mechanism and that the persons concerned have a real opportunity to effectively challenge any adverse decisions adopted concerning their claims. Pushbacks and screening processes at high sea do not meet these requirements.

35. The principle of non-refoulement bars States from returning asylum seekers not only to countries where they may be at risk of persecution, but also to countries where there is a risk of "chain deportation" to the country of feared persecution.

B. Non-refoulement

36. The Australian authorities have put in place a very punitive approach to unauthorized maritime arrivals, with the explicit intention of deterring other potential candidates. Unauthorized maritime arrivals are treated very differently from unauthorized air arrivals, especially when they result in protection claims. This distinction is unjustifiable in international refugee and human rights law and amounts to discrimination based on a criterion — mode of arrival — which has no connection with the protection claim.

37. At all levels, unauthorized maritime arrivals face obstacles that other refugees do not face, including arbitrary, mandatory and prolonged detention periods, transfer to regional processing centres, indefinite separation from their family, restrictions with regard to social services, and no access to permanent residence and citizenship. They experience their treatment as harsh punishment for a crime not committed. Crossing borders irregularly is at most an administrative offence and cannot be considered a crime, especially when done with a view to requesting international protection.

38. This treatment is predicated on the idea that it sends a message to the smugglers and the potential candidates for maritime smuggling operations. However, it is a fundamental principle of human rights law that one person cannot be punished only for the reason of deterring another.

C. Visa refusal and cancellations

39. The Migration Act creates broad and punitive provisions in relation to visa refusal and cancellation. The grounds for considering a refusal or cancellation of a visa include previous criminal activity in any country, providing incorrect information in a visa application, and associations with people or groups who have been or may have been involved in criminal conduct.

40. The inclusion of criminal offences from abroad with no corresponding safeguard to undertake due diligence in relation to the actual circumstances of each case risks penalizing and/or resulting in the detention of people who have been charged or prosecuted criminally for acts relating to a legitimate exercise of their human rights. People could be fleeing persecution from countries where homosexuality or peaceful assembly and association are criminalized, or where the independence of the judiciary is not respected. Additionally, this measure risks further misidentifying victims of trafficking and endangering their right not to be prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

41. It is stated in section 501 of the Migration Act that the Minister may refuse or cancel a visa when government immigration officials "reasonably suspect" that the person has been or is a member of a group or organization, or has had or has an association with a group, organization or person involved in criminal conduct. These broad powers to refuse and cancel visas on the basis of people's previous participation in or link to associations or groups, regardless of whether they have been individually involved in any form of criminal activity, risks compromising the right to freedom of peaceful assembly and association.

42. Such provisions are in contradiction of the principle of presumption of innocence. The lack of clarity of the provisions could also risk a politicized and biased use of controls, and be in violation of the principle of legality. Furthermore, the powers awarded to the Minister and the lack of access to merits reviews and legal challenges in respect of relevant ministerial decisions does not give the appropriate level of oversight to the country's judiciary.

43. The Special Rapporteur met with detainees who had had their visa cancelled, revoked or not renewed because of minor offences, committed sometimes many years previously, such as traffic violations or misdemeanours. This legislation has resulted in detainees being treated as if they had committed serious crimes. The Special Rapporteur is also deeply concerned about those who find themselves in detention because they are alleged to have committed an offence, despite the fact they have been granted bail or parole by an Australian court, or have been acquitted, or have seen the charges dropped.

44. In addition, the Special Rapporteur remains concerned about the lack of clarity regarding how the information gathered from asylum seekers to assess risk and the criteria used to make decisions in relation to visa refusals and cancellations is used, and what safeguards are put in place to protect vulnerable people in situations of undocumented migration. Privacy and confidentiality are of particular importance to people who have left their home country because of persecution and abuses of their human rights, due to the risk of reprisals against family members and because of sensitivities related to prior trauma.

D. Guardianship system for unaccompanied children

45. Child protection is more important than border protection: it should not be tainted by immigration concerns. Unaccompanied migrant children should be provided with guardians who are specialists in child protection. The Minister and employees of Department of Immigration and Border Protection or persons under contract to the Department of Immigration and Border Protection are in a situation of conflict of interest, as their duty to deport unauthorized migrants would conflict with their duty to protect children.

46. Guardians should be either independent and competent personalities or social workers employed in the country's general child protection system. They should be quickly appointed and have all powers necessary to act in loco parentis, according to the best interest of the child. In particular, they should have the power to resist any deportation, detention or transfer to an offshore processing centre, and to appoint a lawyer — publicly funded if needed — to represent the child in all the proceedings affecting the child's rights.

E. Family reunification

47. The right to live with one's family is a fundamental right for all — Australians and foreigners. It is in the best interest of the child to live with both parents; separation for long periods has a huge impact on the development of children left behind. Barriers to family reunification should thus be lifted at all levels and family unity should be systematically fostered and actively facilitated.

48. Reportedly, families living in Nauru or on Manus Island are often separated for several months or years. This happens, for example, when one or several members of the family are flown to mainland Australia for medical purposes, or for what is perceived as intentional separation of families who arrived together and yet are given different visas with different migration pathways, resulting in their physical separation.

49. Moreover, many temporary migrant workers who live and work in Australia for several years are barred from bringing their families to live with them. Families should never be separated for immigration purposes for long periods. In particular, families of vulnerable migrants should never be separated at all. Family reunification should be available to all permanent residents, as well as to all temporary migrant workers who effectively spend more than one year in Australia. Children should always benefit from the most favourable immigration status offered to one or both of their parents, in order to guarantee family unity. Moreover, children or family members with disabilities should not be systematically considered as a health risk preventing the child or the family from settling in Australia.

50. Under the temporary protection visa or the safe haven enterprise visa, family reunion is not possible, which results in indefinite separation of family members. The Special Rapporteur heard of cases where people had voluntarily returned to their home country — including Syrians, whose country is in the midst of a war — just to be with their family.

F. Access to citizenship

51. Australia must be commended for integrating successive cohorts of migrants into its social fabric through generally easy access to citizenship for its permanent residents.

52. However, the Special Rapporteur received information that access to citizenship had been made much more complicated in recent times. In particular, applications for citizenship from refugees who had been unauthorized maritime arrivals but had received permanent residence status were systematically "deprioritized", and delays were therefore accumulating. It is also reported that refugees often face increased requirements for identification papers from their country of origin — requirements that were not present for obtaining permanent residence. Cases were reported of refugee status being cancelled when refugees requested identification documents from their country of origin in order to satisfy the citizenship requirements (as it was alleged that such requests proved that the refugees had availed themselves of the protection of their government): such "catch-22" situations are unworthy of as well-administered a country as Australia.

53. Unauthorized maritime arrivals who receive a temporary protection visa are not eligible for permanent residence or citizenship at all, which prevents their legal integration even when they are socially integrated. Such "permanent temporary" situations should be resolved quickly in favour of the foreigners' full integration.

54. The Department of Immigration and Border Protection should consider giving greater weight to time spent living in Australia in considering applications for permanent residence, as well as setting a limit on the period, for example five years, after which it would be considered reasonable for any temporary visa holder to qualify for permanent residence and later citizenship. Reportedly, migrants with disabilities also find it difficult to access permanent residence or citizenship because of their disability.

V. Detention

55. On 31 August 2016, there were 1,602 persons in immigration detention facilities, including 1,355 in immigration detention on the mainland and 247 in immigration detention on Christmas Island. There were 410 persons (306 men, 55 women and 49 children) in the regional processing centre in Nauru and 823 persons (all adult males) detained in the regional processing centre on Manus Island. The number of detainees who had arrived unlawfully by air or boat was 581, representing 36.3 per cent of the total immigration detention population. There were also 1,021 detainees (63.7 per cent of the total immigration detention population) who had arrived in Australia regularly and had had their visa cancelled for either overstaying their visa or breaching their visa conditions. There were 197 people from New Zealand, 176 people from the Islamic Republic of Iran, 121 people from Viet Nam, 106 people from Malaysia, 87 people from Sri Lanka, 79 people from India, 70 people from China, 67 people from Afghanistan and 58 people

from the United Kingdom of Great Britain and Northern Ireland, as well as 641 people from various other countries.[1]

56. Australia has reduced the number of people in detention by developing alternatives to detention and providing detainees with bridging visas. According to international standards, an individual assessment mechanism is required in order to determine the necessity, proportionality and reasonableness of detention in each individual case. A policy of mandatory detention leaves no space for considering the particular circumstances of each detainee's case or for applying all procedural safeguards applicable to persons deprived of their liberty.

57. The average time in immigration detention is 454 days. The Special Rapporteur met people who had been in detention for over seven years. Prolonged and indefinite detention has a profound effect on migrants' mental well-being, with many cases reported of self-harm, post-traumatic stress disorder, anxiety and depression. It is not the right environment for often already traumatized people. Those who leave detention after a prolonged period often continue to suffer from low self-esteem, which takes from them the opportunity to rebuild their lives. The Special Rapporteur joins the voices of other United Nations human rights mechanisms in saying that such conditions amount to cruel, inhuman and degrading treatment.

58. The Special Rapporteur also met with detainees who had been given indefinite detention because they were refugees who had failed either their adverse security assessment or their character assessment, or stateless persons whose asylum claims had been refused. A judicial review process is important for these groups of detainees, and wherever possible, options for non-custodial measures and alternatives to detention should be offered.

59. The Special Rapporteur commends the increased use of alternatives to onshore detention, through placement in "community detention". However, more alternatives to detention could be explored in order to reduce the time in detention. Placing detainees in centres near family or friends should also be prioritized. The uncertainty regarding the immigration status of those in "community detention" or released on temporary protection visas continues to affect their mental state and many have limited access to medical services — including emergency care — and social support.

60. There is also a financial cost to keeping persons in detention. Australian taxpayers pay the equivalent of over US$400,000 per person per year to keep them in regional processing centres in Nauru and on Manus Island, and US$240,000 per person per year to keep them in onshore detention.[2] The cost of keeping people in "community detention" is estimated at US$90,000 per person per year, whereas keeping a person on bridging visas costs US$33,000 per person per year.[3]

61. The release of unauthorized maritime arrivals into "community detention" or with bridging visas or temporary protection visas should be meaningful in terms of work rights and duration of visas. Visas without work rights or visas issued for only a limited period, which need to be renewed every few months, lead to deteriorating mental health, homelessness and destitution. "Permanent temporary" situations should be avoided at all costs.

62. The Special Rapporteur observed that, in many cases, migrants are redetained from the community for a breach of the "code of behaviour". This constant fear about status, but also the possibility of being returned, leads to an increased level of instability, which further reflects in migrants' mental health. Due to its discriminatory nature, the code's

[1] See www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-aug-2016.pdf.

[2] See www.anao.gov.au/work/performance-audit/offshore-processing-centres-nauru-and-papua-new-guinea-procurement.

[3] National Commission of Audit, 10.14 Illegal Maritime Arrivals, appendix volume 2, 2014, Government of Australia (available from www.ncoa.gov.au/report/appendix-vol-2/10-14-illegal-maritime-arrival-costs.html).

implementation should cease. Migrants are already subject to existing provisions in criminal and penal legislation.

63. The material conditions in the modern onshore detention centres visited were generally good, except for in Villawood: in its Blaxland compound, the Special Rapporteur observed that the dormitories were not well kept, and received information that cleaning was not regularly and properly conducted. The geographical isolation of most detention centres means that access to the detention centres by lawyers, civil society organizations and families is often incredibly difficult. Regular daily free shuttle services from city centres would alleviate the sense of isolation and facilitate contacts.

64. Many testified to the increased "securitization" of the immigration detention centres. The arrival of the Australian Border Force and the increased number of foreigners in detention after having served a prison sentence (the "501s") has driven a considerable increase in security control procedures. Mixing asylum seekers and undocumented migrants with the "501s" should be avoided at all costs. It was readily acknowledged that a "prison culture" had changed the atmosphere of detention centres: a "garrison mind set", as described by a government official. Detained asylum seekers testified to regular bullying from the "501s", who also are adept at smuggling items into the centres, only to blame refugees — mainly unauthorized maritime arrivals — if discovered, thus hardening the control measures further. Increased violence from the guards, especially during transfers, such as systematic handcuffing, aggressive language and brutalities that did not exist before, were also regularly mentioned. Violence among detainees has also increased. Transfers happening during the night, without appropriate notice or time to prepare, accompanied by a deployment of force and by shouting, were experienced as terrifying. Transfer to Christmas Island is perceived as punishment for protesting against harsh treatment in onshore detention centres.

65. Limitations have been placed on the ability of migrants to circulate between different compounds in the same detention centre. Outside visits to doctors or hospitals are reported to be systematically undertaken with heavy security and with handcuffs. In some cases, outside excursions under the supervision of civil society organizations have been discontinued. They are now under the supervision of Serco guards and are reported as being undertaken with handcuffs. Consequently, many refuse such excursions, as they do not want to be paraded as criminals in the streets. The Special Rapporteur received information about abuse of power by some of the security and medical service providers in the detention facilities. He also received reports of verbal and physical attacks, and acts of intimidation, taunting and provocation against detainees. Additionally, he received information that some medical service providers ignored or dismissed medical complaints and did not provide appropriate medical care. Detainees also did not have access to their medical file, and it came to his attention that complicated medical procedures were sometimes explained without an interpreter, making it difficult for them to take an informed decision. The detainees had little trust in the complaints mechanism.

A. Children in detention

66. The continuous increase in the number of children (aged less than 18 years) in detention facilities from April to August 2013 was due to a rapid increase in unauthorized maritime arrivals during that period. The number of children in detention facilities declined during late 2013 and in 2014, with further reductions in January 2015. On 31 August 2016, there were fewer than five children in Immigration Residential Housing, Immigration Transit Accommodation or Alternative Places of Detention. The number of children in community detention has levelled off, to its lowest number since the peak in November 2013, because of releases into the community on bridging visas.

67. The strong push by Australia to significantly reduce the number of onshore children in detention to what has been reported to be a handful is great progress and exemplary. The Special Rapporteur urges the Government to strengthen this commitment into law and look into alternatives for those children at all times, and to ensure that they receive appropriate

services for their care. Children should be kept with their families or close to those with whom they have a familial bond.

68. As determined by the Committee on the Rights of the Child, administrative detention based on the immigration status of the child or of his or her parents can never ever be in the best interest of the child. Given the incalculable detrimental effects that detention has on children's mental and physical health and development, it is utterly unacceptable for children to be detained simply because of an administrative status.

69. Against their best interests, many children are however still kept in the regional processing centres and settlements in Nauru in detention-like conditions. The regional processing centres resemble military barracks, are fenced, are guarded by security officers, and their inhabitants have to sign in and sign out each time they leave or enter the camp. Children in settlements also feel the effect of forced confinement. Children held in Nauru show signs of post-traumatic stress disorder, anxiety and depression, and exhibit symptoms such as insomnia, nightmares and bed-wetting. Feelings of hopelessness and frustration can lead to acts of violence against themselves or others. The Special Rapporteur heard of suicide attempts and self-harm, mental disorders and development problems, including severe attachment disorder. Many of the parents despair over the impossibility of offering their children a promising future, and feel guilty, which manifests itself in severe depression and poor parenting.

70. An accurate and effective individual assessment mechanism would prevent vulnerable groups, such as children, especially if unaccompanied, from being transferred to offshore detention centres. Regardless of detention conditions, detention itself has a profound and negative impact on child health and development. Even short periods of detention can undermine the child's psychological and physical well-being and compromise cognitive development. The threshold at which treatment or punishment may be classified as cruel, inhuman or degrading is therefore lower in the case of children, and in particular in the case of children deprived of their liberty.

71. The appropriate mental health care that is required, due to the damage caused by their prolonged detention and that of their families, is available neither in the regional processing centres nor in the community. In order for them to live a normal life in any country capable of offering them adequate opportunities to build a future, prolonged mental health care — way beyond the administration of antidepressant or anxiolytic medication — will be necessary.

B. Regional processing centres in Nauru and Papua New Guinea

72. All detention centres and detainees — whether onshore or offshore — fall under the responsibility of the Government of Australia.

73. All persons who are under the effective control of Australia — because, inter alia, Australia transferred them to regional processing centres, which are funded by Australia, and with the involvement of private contractors of Australia's choice — enjoy the same protection from torture and ill-treatment under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This is not only the Special Rapporteur's own analysis but also that of the 2015 Australian Senate inquiry on Nauru,[4] as well as that of a number of United Nations human rights mechanisms, including the Committee against Torture. The Government of Australia is ultimately accountable for any human rights violations that occur in the regional processing centres based in Nauru and Papua New Guinea. The combination of the harsh conditions in Nauru or on Manus Island, the protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental anguish and suffering. The Special Rapporteur observes that regarding human rights issues, the system cannot be salvaged.

[4] See www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru, para. 5.7.

74. Moreover, for the approximately 1,233 detainees in the regional processing centres in Nauru and on Manus Island, approximately US$900 million is spent yearly on health care. It is estimated that $A868,000 are spent yearly on each man, woman and child in regional processing centres. Such a system is unsustainable. Quickly closing these centres is the only solution.

75. In April 2016, the Supreme Court of Papua New Guinea ruled that the detention of asylum seekers and refugees on Manus Island was unconstitutional, finding it to be in breach of their personal liberty. The Court ordered that the Governments of Papua New Guinea and Australia make arrangements to move people out of detention. Since the decision by the Court, no practical steps have been taken to shut down the centre. On 17 August 2016, Papua New Guinea and Australia agreed to close the detention centre for asylum seekers in Papua New Guinea. It remains unclear where the asylum seekers on Manus Island will be resettled.

1. The regional processing centres in Nauru

76. The treatment of the approximately 1,500 asylum seekers and refugees in Nauru has seen some improvements since the reopening of the centres in 2012. Australia has made a considerable investment in order to develop the infrastructure necessary for over a thousand asylum seekers and to process their refugee determination claims. The regional processing centres were initially closed detention facilities, but they have since been opened; although the estimated 410 asylum seekers are still required to live in the regional processing centres, their opening has reduced some of the stress experienced by detainees. Still, the geographical and psychological isolation of Nauru, the equatorial heat bearing down on often still non-air-conditioned tent dwellings, the length of the processing (soon to be four years for many of them since their arrival) and the absence of any solution allowing them a durable resettlement in a country where they can imagine a future for themselves and their children makes the unresolved situation extremely difficult to bear.

77. The testimonies that the Special Rapporteur heard were often of despair, due to the lack of information or contradictory information concerning their future: many try to keep themselves busy working, but most have found it more and more difficult to endure as time goes by without a solution, and very few could imagine a future on Nauru. Mental health issues are rife, with post-traumatic stress disorder, anxiety and depression being the most common ailments. Many refugees and asylum seekers are on a constant diet of sleeping tablets and antidepressants. Children also show signs of mental distress. Although some go to school, they continue to have trouble integrating, due to the presence of often depressed and anxious parental role models, the impossibility of concretely dreaming about a future for lack of tertiary education opportunities, and the prolonged uncertainty of life on the margins without any hope of change in sight. All this takes a heavy toll on the children's mental health. Many adolescents are themselves already on antidepressants.

78. Many of the migrants reported incidents of verbal abuse, physical attack or theft from the local community. The Special Rapporteur received information that, despite complaints to the local police, no one is being held accountable, and due to their lack of trust in the local police, incidents more often go unreported. The Special Rapporteur heard accounts of the rape and sexual abuse of female asylum seekers and refugees by security guards, by service providers, by refugees and asylum seekers or by Nauruans, and there is not a proper and independent investigation mechanism in place, making the life of women in the regional processing centres unbearable. Women and girls fear reporting such incidents to the Nauruan police, and even when they are reported, investigation or appropriate sanctions rarely ensue.

79. Considering that this situation is purposely engineered by Australian authorities to serve as a deterrent for potential future unauthorized maritime arrivals ("we stopped the boats"), considering the incredible hardship that most of these asylum seekers and refugees have already endured in their countries of origin and in transit countries on their way to Australia, and considering that Australian authorities have been alerted to such serious issues by numerous reports from international organizations such as the United Nations and civil society organizations, Australia's responsibility for the physical and psychological damage suffered by these asylum seekers and refugees is clear and undeniable.

80. The forced offshore confinement (although not necessarily detention anymore) in which asylum seekers and refugees are maintained constitutes cruel, inhuman and degrading treatment or punishment according to international human rights law standards. Australia would vehemently protest if such treatment were inflicted by any other State on Australian citizens, and in particular on Australian children.

81. Ultimately, Australia has the responsibility to settle or resettle refugees presently in the regional processing centres in Nauru and Papua New Guinea. Any agreement regarding third-country resettlement must be meaningful — in terms of numbers, timeliness and opportunities to rebuild lives — and must adhere to Australia's international humanitarian and human rights obligations. The Government should take family linkages and individual vulnerabilities into account and provide appropriate protection to particular vulnerable migrants.

82. Terminating the offshore processing policy, quickly closing down the regional processing centres in Papua New Guinea and Nauru and repatriating all asylum seekers and refugees to the Australian mainland seems to be the only possible short-term solution if Australia is to remedy the systemic human rights violations that this policy creates.

2. Complaints against service providers in immigration detention centres and regional processing centres

83. The internal complaint mechanism within the regional processing centres concerning abusive behaviour by service providers and guards does not provide sufficient guarantees of a due and independent investigation. The Special Rapporteur was informed that, after a sexual assault is reported to a centre's management, the perpetrators are often transferred to a different regional processing centre without investigation and prosecution. To his knowledge, none of the alleged perpetrators have been convicted so far. As a result, most of the single women marry or have a boyfriend in order to get themselves some sort of protection.

84. Australia must ensure that reports of abuse in the regional processing centres are investigated by an independent mechanism and that persons found guilty are held accountable.

C. Human rights defenders

85. The Special Rapporteur was particularly impressed with the energy, imagination, dedication and commitment of civil society organizations working with migrants — with or without contracts with the Australian authorities — to deliver integration programmes and services to them. Their intimate knowledge of the migrants' difficult journeys, complex life conditions and numerous aspirations for the future — coming from years of engaging with them — have allowed them to provide a refined analysis, very relevant conclusions and most welcome recommendations regarding changes in policy and practice. The Special Rapporteur urges the Australian authorities to increase funding and material support to such organizations.

86. Civil society organizations, whistleblowers, trade unionists, teachers, social workers and lawyers, among many others, may face criminal charges under the Australian Border Force Act for speaking out and denouncing the violations of the rights of migrants. The Special Rapporteur welcomes the fact that health professionals have recently been excluded from these provisions and hopes that this will also extend to other service providers who are working to defend the rights of migrants in a vulnerable situation.

VI. Cross-cutting issues

A. Access to justice

87. Immigration administrative decisions can have consequences that are worse than those of criminal law decisions: an erroneous immigration decision can send someone to arbitrary detention, torture or even death, all outcomes which have been banned from Australian criminal law. To avoid such results, the criminal law has evolved, over a period of centuries, guarantees of a fair trial and of the rights of the defence. Administrative law must provide similar guarantees, when the consequences of the decision can be similar or worse.

88. The Special Rapporteur welcomes the efforts by Australia to quickly process the asylum claims referred to as the "legacy caseload", which involve 30,000 asylum seekers, through the reintroduction of temporary protection visas and the establishment of a "fast-track process". Reportedly, more than half are yet to apply for humanitarian protection. So far, 3,000 people have been declined refugee status and 2,800 people have been granted a visa. However, concern remains that the "fast-track process" does not incorporate appropriate procedural safeguards, including the opportunity to be heard in person.

89. The Special Rapporteur urges the Government to include working rights and a reasonable duration on the visas (bridging visas or temporary protection visas) issued to foreigners released into the community, so that they can support themselves and their families while waiting to apply for or receive a decision. Many are issued with three-month visas, which do not make them employable and result in situations of destitution. The unbearable uncertainty of "permanent temporary" situations should be avoided at all costs.

90. Moreover, territorial sovereignty and the control of borders cannot justify any and all distinctions between foreigners and citizens. The only way to ensure that a distinction is not discriminatory is to ensure that courts and tribunals can review effectively the decisions made that affect the rights of individuals, whatever their status, and can check whether discrimination has occurred. This can only happen if access to justice, as required by international law, is available to all, regardless of immigration status.

91. Administrative law is complicated and migrants already face many barriers, including language, lack of legal information and information about their rights, social isolation, absence of financial means, and, for those who are in detention, physical separation. There can be no effective access to justice without effective support from competent judges, adequate legal representation and sufficient legal aid funding. In detention centres, an explanation by a case manager under contract from the Department of Immigration and Border Protection is not sufficient, as such persons represent the same department that will ultimately take the decision on the migrant's immigration status.

92. Therefore, in immigration matters, Australia must lift all barriers to judicial review and appeals and the exception to the rules of natural justice. The Migration Act gives wide-ranging ministerial powers of discretion, which are non-compellable and non-reviewable. The Special Rapporteur cautions that such powers must not undermine the fundamental role of the judiciary. Moreover, Australia should repeal section 52 of the Disability Discrimination Act 1992, which exempts migration laws, regulations, policies and practices from the effects of the Act, leading to negative immigration decisions based on disability or health conditions.

93. Freedom of information procedures should also be strengthened, in order to ensure that no decision is taken which could affect the rights of individuals, where they have not been able to obtain all the information needed for adequate legal representation.

B. Labour exploitation

94. The Special Rapporteur welcomes the various types of visa options available for migrants to come and work in Australia, such as the temporary work (skilled) visa (subclass 457) commonly known as the "backpacker's visa", working holiday visas and seasonal

worker visas. While the Special Rapporteur welcomes the fact that temporary protection visas and safe haven enterprise visas provide access to work rights and a range of key services in the Australian economy, these visas do not offer a long-term solution for asylum seekers. In addition, applications for temporary protection visas need to be lodged on a regular basis and the uncertainty contributes to anxiety and mental distress. This two-tier system, with differentiations in the rights enjoyed by those on full protection visas and those on temporary protection visas, is discriminatory.

95. The Special Rapporteur was informed of the exploitation of migrants on working holiday visas, and of asylum seekers on bridging visas, by employers in Australia. They are made to work long hours and are paid wages that are below the legal minimum in Australia, often in the construction, agricultural and hospitality industries. Temporary work visas may therefore serve to increase the vulnerability of migrant workers.

C. Xenophobic speech and discriminatory acts

96. One in every two Australians was either born overseas or has a parent who was born overseas. The Special Rapporteur welcomes the country's commitment to multiculturalism.

97. At the same time, one in five Australians has experienced race-hate speech and one in twenty has been physically attacked because of their race.[5] Xenophobia and hate speech have increased, creating a significant trend in the negative perceptions of migrants. Politicians who have engaged in this negative discourse seem to have given permission to many to act in xenophobic ways and have allowed for the rise of nationalist populist voices.

98. While migrants who arrive in countries of destination without documents may be in an "irregular" or "undocumented" or "unauthorized" situation, they have not committed a criminal act. A human being cannot be intrinsically "illegal", and naming anyone as such dehumanizes that person. The conceptualization of irregular migrants as "illegals" has undoubtedly played into the criminalization of migrants and thus into the use of immigration detention.

99. Australia must strengthen efforts to fight xenophobia, discrimination and violence against migrants, in acts and speech. Section 18 (c) of the Racial Discrimination Act sets the tone of an inclusive Australia committed to implementing its multicultural policies and programmes, and to respecting, protecting and promoting the human rights of all: committing to section 18 (c) is essential, and, if interpretation issues arise, they should be left to the judiciary.

VII. Conclusions and recommendations

100. **In conclusion, the best way of ensuring the legitimacy of laws, policies and practices is to have their conformity with human rights standards assessed by courts and ultimately by the High Court of Australia. The Australian authorities should consider the adoption of a constitutional guarantee of human rights, an Australian bill of rights, or at least a legislative guarantee of human rights — a human rights act — with a clause of precedence over all other legislation. Such guarantees could be invoked by anyone, citizen or foreigner, whose rights are threatened by a decision of Australian authorities, at any time, before any court of law or tribunal. This would provide better protection for the rights of all, regardless of their status.**

101. **Australia must also develop and implement a human rights-based approach to migration and border management, ensuring that the rights of migrants, including irregular migrants, are always the first consideration.**

[5] Andrew Markus, *Mapping Social Cohesion 2016: National Report*, available from http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf.

A. Normative and institutional framework for the protection of the human rights of migrants

102. **Ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and establish an independent national preventative mechanism.**

103. **Ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the Migration for Employment Convention (Revised), 1949 (No. 97), and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).**

104. **Ensure that all Australian legislation, including the Migration Act, is fully in line with international human rights standards and the interpretation of those standards provided by international human rights bodies.**

B. Border management

105. **Recognize that, at some point, repression of irregular migration is counterproductive, as it drives migrants further underground, thereby empowering smuggling rings, and creating conditions of alienation and marginalization that foster human rights violations, such as exploitation, discrimination and violence against migrants.**

106. **Ensure that readmission and cooperation agreements aimed at, inter alia, combating irregular migration, include safeguards to fully respect the human rights of migrants, and ensure adequate protection of vulnerable migrants, including asylum seekers and refugees, in particular regarding the principle of non-refoulement. Such agreements should be negotiated and published in full transparency, with clear human rights guarantees and accountability mechanisms integrated at all stages.**

107. **Direct the Department of Immigration and Border Protection to conduct a review of proposals to give greater weight to time spent living in Australia in consideration of applications for permanent residence. The review should also consider the merits of setting a limit on the period of temporary residence after which it would be reasonable for any temporary visa holder to qualify for permanent residence.**

C. Detention

108. **Change its laws and policies related to mandatory administrative detention of migrants in an irregular situation and asylum seekers, so that detention is decided on a case-by-case basis and pursuant to clearly and exhaustively defined criteria in legislation, under which detention is a measure of last resort and is limited to the shortest time possible, rather than being the automatic consequence of a decision to refuse admission of entry or of a removal order.**

109. **Ensure that migrants are detained only because there is reasonable evidence that they present a danger to the public, or would abscond from future proceedings.**

110. **Ensure that non-custodial measures are always considered first as alternatives to detention.**

111. **Ensure that all detained migrants have access to proper medical care, adequate food and clothes, hygienic conditions, adequate space to move around, and access to outdoor exercise.**

112. **Systematically inform detained migrants in writing, in a language that they understand, of the reason for their detention, its duration, their right to have access to a lawyer, their right to promptly challenge their detention and their right to seek asylum.**

113. **Ensure that all detained migrants are able to promptly contact their family, consular services and legal counsel.**

114. **Develop comprehensive human rights training programmes for all staff who work in such centres, including to provide them with the ability to identify detainees exhibiting mental health problems.**

115. **Improve available mental health services in detention, based on the principle of informed consent.**

116. **Provide on-site interpreters in immigration detention facilities, at least for commonly spoken languages, so as to render health services and other services more accessible and appropriate for detainees lacking English-language skills.**

117. **Adopt all necessary measures to ensure that stateless persons whose asylum claims are refused and refugees with adverse security or character assessments are not held in detention indefinitely, including by resorting to non-custodial alternatives to detention.**

118. **Quickly close down the regional processing centres in Papua New Guinea and Nauru and terminate the offshore processing policy, in order to remedy the systemic human rights violations that this policy creates.**

119. **Immediately repatriate all children and families with children from regional processing centres to mainland Australia and place them in communities with appropriate child and family psychiatric care and appropriate support for their integration in the school and social systems.**

120. **Find meaningful and timely resettlement options for all refugees in regional processing centres, while respecting the right to family unity. Any agreement regarding third-country resettlement must be meaningful in terms of numbers, timeliness, and opportunities to rebuild one's life, take into account particularly vulnerable migrants, and respect Australia's international humanitarian and human rights obligations. Refugees and migrants who cannot be quickly resettled in a foreign country must be repatriated without delay on Australian territory.**

D. Access to justice

121. **Ensure the independent and systematic monitoring of all detention centres by independent and competent oversight mechanisms, so that they are all brought to the same standards. In order to foster accountability for human rights abuses, their reports should be immediately made available to the public.**

122. **Ensure that reports of abuse in regional processing centres are properly investigated by an independent and competent oversight mechanism, and that persons found guilty are held accountable.**

123. **Allow the Australian Human Rights Commission to inquire at will in offshore regional processing centres about the actions of Australian authorities and of service providers.**

124. **Ensure full and proper access to justice for all detainees, including by means of a more accountable system for lodging complaints within detention centres.**

125. **Ensure that all detained persons who claim protection concerns are, without delay, adequately informed of their right to seek asylum, and able to register their asylum claim, and can communicate with UNHCR, lawyers and civil society organizations.**

126. **Ensure that migrants, asylum seekers and refugees, whatever their status, have easy access to competent lawyers, free of charge when needed, in order to challenge any decision made that threatens their rights and freedoms, especially in expulsion, detention and asylum procedures.**

127. **Simplify and encourage civil society organizations' access to detention centres in order to reinforce the information that migrants need in order to make appropriate choices regarding their legal options.**

128. **Ensure that detention appeal proceedings allow for a regular review of the merits of the detention, and not only of its legality.**

E. Cross-cutting concerns

129. **Provide access to basic services such as health care to everyone living in the Australia, regardless of their immigration status, in accordance with international human rights standards.**

130. **Implement "firewalls" between public services and immigration enforcement, thereby offering better access to effective labour inspection, access to justice, and access to other public services such as housing, health care, education, and police and social services, for all migrants, regardless of status, without fear of detection, detention and deportation. This would also allow for better collection of disaggregated data by government agencies, especially on undocumented migrants.**

131. **Ensure respect by all service providers in onshore and offshore detention facilities of the Guiding Principles on Business and Human Rights, adopted in 2011 by the Human Rights Council, which underscore as one of their foundational principles the corporate responsibility of business enterprises to respect human rights.**

132. **Ensure effective enforcement of laws prohibiting racist and xenophobic acts as well as hate speech and racially motivated violence against migrants and asylum seekers. Ensure that such acts are prosecuted and punished and that appropriate compensation is awarded to the victims.**

133. **Strengthen the efforts to apply the legislation in order to combat direct or indirect discrimination with regard to the enjoyment of economic, social and cultural rights by migrants, refugees and asylum seekers, including in access to private rental housing and to the labour market.**

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru: comments by the State

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the comments by the State on the report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the Regional Processing Centre in Nauru.

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Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru: comments by the State *

Response to recommendations

Australia thanks the Special Rapporteur on the human rights of migrants for providing a draft copy of his report on his visit to Australia (1–18 November 2016). We have reviewed the draft report and make the following suggestions to correct errors of fact or law in the report.

In addition, the Australian Government reiterates that it is not appropriate to prepare one country report in relation to visits to two independent and sovereign nations, Australia and Nauru. Australia's response to the recommendations is limited to responding to matters relating to Australia.

Para. No.	Recommendation	Response
98	In conclusion, the best way of ensuring the legitimacy of laws, policies and practices is to have their conformity to human rights standards assessed by courts and ultimately by the High Court of Australia. Australian authorities should consider the adoption of a constitutional guarantee of human rights, an Australian Bill of Rights, or at least a legislative guarantee of human rights, a Human Rights Act, with a clause of precedence over all other legislation. Such guarantees could be invoked by anyone, citizen or foreigner, whose rights are threatened by a decision of Australian authorities, at any time, before any court of law or tribunal. This would provide better protection for the rights of all, regardless of status.	The Australian Government does not propose to alter its federal model of Parliamentary supremacy by introducing a judicially enforceable human rights act. It considers that existing mechanisms provide for the protection and promotion of human rights.
99	Australia must also develop and implement a human rights-based approach to migration and border management, ensuring that the rights of migrants, including irregular migrants, are always the first consideration.	Human rights are considered in the development of laws relating to migration and border management, under the *Human Rights (Parliamentary Scrutiny) Act 2011*, and policies guiding the exercise of migration and border management powers are drafted consistently with relevant human rights considerations.
100	Ratify the Optional Protocol to the Convention against Torture and establish an independent national preventative mechanism.	On 9 February 2017 the Australian Government announced its intention to ratify OPCAT by December 2017, subject to consultation with states and territories. OPCAT ratification will provide additional, independent monitoring of places of detention, including immigration detention, under Australia's jurisdiction and control by a network of Australian inspectorates (called a National Preventive Mechanism), and the United Nations Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or

* Reproduced as received.

		Degrading Treatment or Punishment. The Commonwealth Ombudsman will be responsible for inspecting immigration detention centres under OPCAT.
101	Ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the ILO conventions on Migration for Employment Convention (Revised), 1949 and the Migrant Workers (Supplementary Provisions) Convention, 1975.	Australia already has strong protections in place for migrant workers which are the same protections as afforded to Australians. Australia's treaty-making policy is to only ratify treaties when compliance with domestic law and practice in all jurisdictions can be assured. These Conventions are likely to be incompatible with domestic migration policies, social security and other laws which have a long-standing residency eligibility criteria (linked to Australian citizenship and permanent residency status), with related fiscal impacts. Examples of provisions that raise barriers to compliance with Australian law and practice include the obligations with regard to equality of treatment between immigrants and nationals under Article 6 of Convention 97 and Articles 8 and 10 of Convention 143, which cannot be guaranteed in all circumstances for the government services that are specified in these provisions. The Australian Government addresses the issues covered by the Conventions in a number of ways. Australia recognises the importance of providing legal protections to migrant workers. The human rights of migrants and temporary entrants to Australia are protected under applicable domestic and international law, including the human rights conventions to which Australia is a party. Temporary visa holders with a work right are entitled to the same basic rights and protections as Australian citizens and permanent residents under applicable workplace relations laws. Victims of abusive and fraudulent practices have access to civil mechanisms, such as the Fair Work Ombudsman, and have the ability to pursue civil and administrative remedies, including for unpaid wages and entitlements, irrespective of their nationality. Many minimum workplace relations conditions are provided for under Australian law by the Fair *Work Act 2009* and related Fair Work instruments. The Fair Work Act covers the majority of private sector employees and employers in Australia (further information on coverage is included below). For workplaces covered by the Fair Work Act, the laws apply to Australian citizens, permanent residents and temporary visa holders. (Every worker from overseas must have a valid Australian visa with work rights.) Australia also has a range of measures in place specifically to address instances of exploitation of foreign workers. Australia has in place to manage

		exploitation of migrants. In 2013, Migration Act was amended to allow the department to better address illegal work hire practices. The amendment introduced graduated tiers of sanctions to deter illegal work hire practices and sanction employers and labour suppliers that persist in non-compliant behaviour. The general protections provisions of the Fair Work Act protect employees from discrimination and ensure basic rights such as freedom of association and freedom from discrimination. The protections also apply to prospective employees. Protections and duties specified under workplace health and safety legislation apply to all workplace participants and do not distinguish by citizenship or residency status. The Australian Government is committed to addressing discrimination in Australia. Australian anti-discrimination law targets discrimination on the basis of race, sex, age and disability. Migrant workers are protected by anti-discrimination legislation at the Commonwealth and State/Territory levels of government. Commonwealth anti-discrimination legislation includes the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. These Acts cover direct and indirect discrimination. Anti-discrimination legislation has been enacted at the State and Territory as well as Federal levels of government. This means that in relation to discrimination in the workplace, most employers in Australia are bound by Commonwealth and State/Territory anti-discrimination legislation as well as Commonwealth workplace relations legislation (apart from those employers in some jurisdictions, mostly public sector entities, which continue to be covered by State workplace relations legislation). The Australian Government has a strong commitment to addressing the exploitation of vulnerable workers in Australian workplaces, including migrant workers, and has introduced a number of initiatives to improve compliance with workplace laws. Under the Protecting Vulnerable Workers Policy, the Government has committed to provide additional funding for the Fair Work Ombudsman, establish a Migrant Workers' Taskforce and to amend the *Fair Work Act 2009* to strengthen protections for vulnerable workers. Australia has a comprehensive strategy to combat human trafficking, slavery and slavery-like practices. Australia also works to combat labour exploitation by cooperating with other governments in our region and internationally.
102	Ensure that all Australian legislation, including the	Under the *Human Rights (Parliamentary Scrutiny) Act*

	Migration Act, is fully in line with international human rights standards and the interpretation of those standards provided by international human rights bodies	2011, all new legislation, including amendments to existing legislation such as the Migration Act, must be accompanied by a statement assessing the compatibility of the legislation with the rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. Australia interprets its treaty obligations in good faith and is guided by the interpretations taken by the competent bodies, noting that the views of those bodies are persuasive rather than binding.
103	Recognize that, at some point, repression of irregular migration is counterproductive, as it drives migrants further underground, thereby empowering smuggling rings, and creating conditions of alienation and marginalization that foster human rights violations, such as exploitation, discrimination and violence against migrants.	Australia's strong border protection policies, and the success of Operation Sovereign Borders in stamping out people smuggling across the region, has enabled the Australia Government to make a generous contribution to global humanitarian resettlement efforts and increase our Humanitarian Programme intake to 16 250 places in 2017–18 and then 18 750 places from 2018–19 ongoing. In addition to Australia's annual Humanitarian Programme intake, Australia is also resettling an additional 12,000 people displaced by the current conflict in Syria and Iraq. The regional composition of Australia's offshore Humanitarian Programme takes into consideration advice on global resettlement needs identified by the UNHCR. Expanding the number of resettlement places available to both refugees and others in humanitarian need provides a safe, orderly and regular pathway to Australia which reduces the need for vulnerable people to engage with the services of criminal people smugglers. To support these efforts, Australia delivers an intensive awareness-raising communication campaign across 13 countries to deter migrants considering illegal maritime travel to Australia. The aim of this campaign is to inform and educate people about Australia's border protection policies as well as highlight the realities of hazardous sea journeys, the financial risks of engaging people smugglers, the deception and lies of people smugglers, and the consequences of illegal migration to Australia by sea.
104	Ensure that readmission and cooperation agreements aimed at, inter alia, combatting irregular migration, include safeguards to fully respect the human rights of migrants as well as ensure adequate protection of vulnerable migrants, including asylum seekers and refugees, in particular regarding the principle of non-refoulement. Such agreements should be negotiated and published in full transparency, with clear human rights guarantees and accountability mechanisms integrated at all stages.	Australia takes its international obligations seriously. The negotiation of agreements and memoranda of understanding with foreign governments for cooperation and for the return of people with no right to remain in Australia ensure that these arrangements are compliant with relevant international obligations. Prior to a person's return from Australia, DIBP ensures that the returnee does not engage Australia's non-refoulement obligations.
105	Direct the DIBP to conduct a review of proposals to give greater weight to time spent living in Australia in consideration of applications for permanent	The Department continually considers ways to improve the visa system, including pathways to permanent residence.

	residency. The review should also consider the merits of setting a limit on the period of temporary residence after which it would be reasonable for any temporary visa holder to qualify for permanent residency.	Australian permanent residence is an important step in a migrant's journey towards becoming an Australian citizen. To attain permanent resident status, an individual must submit an application for a relevant visa and meet all the criteria for that visa. These criteria may include but are not limited to how long an applicant has spent in Australia. It is critically important that Australia continues to maintain the integrity of the Australian migration system. It would not be acceptable to jeopardise the integrity of Australia's migration system by increasing the weighting placed on time spent in Australia to the point that any temporary visa holder would qualify for permanent residency simply as a result of time spent in Australia.
106	(c) urge its laws and policies related to mandatory administrative detention of migrants in an irregular situation and asylum-seekers, so that detention is decided on a case-by-case basis and pursuant to clearly and exhaustively defined criteria in legislation, under which detention is a measure of last resort and limited to the shortest time possible, rather than being the automatic consequence of a decision to refuse admission of entry or a removal order;	Immigration detention is an important part of strong border control and supports Australia's migration system. It assists in managing potential risks to the Australian community – including national security, health and character risks – and ensures people are available for removal. A person who does not hold a valid visa must be detained under the Migration Act, however whether the person is placed in an immigration detention facility is determined using a risk-based approach. In Australia, immigration detention is administrative not punitive and assists the Department to manage its temporary entry and permanent migration programmes. Detention in immigration detention centres is used as a last resort and for the shortest possible time. Generally, those of low risk are able to have their immigration status resolved in the Australian community through the grant of a bridging visa. High risk unlawful non-citizens remain subject to detention in immigration detention facilities as necessary. The safety of the Australian community is important. The decision to place an individual who does not hold a valid visa into an immigration detention facility includes consideration of whether or not they present a risk to the Australian community.
107	(d) ensure that migrants are detained only because there is reasonable evidence that they present a danger to the public, or would abscond from future proceedings;	The Migration Act imposes a duty on officers to detain a person they know, or reasonably suspect, is an unlawful non-citizen. Where a person is taken into immigration detention they cannot be released until they are granted a visa or removed from Australia. Placement in an immigration detention facility is based on an assessment of the person's risk to the community. Community-based options may be used if the individual does not present unacceptable risks to the community. Individuals may be required to comply with various conditions while remaining in the community until a substantive immigration status outcome has been reached and/or they leave the

		country. Detention Review Committees are held monthly to review all cases in held detention to ensure the ongoing lawfulness and reasonableness of the initial decision to detain a person, by taking into account all the circumstances of the case, including adherence to legal obligations. This periodic review takes into account any changes in the client's circumstances that may impact on immigration pathways including returns and removal, to ensure the continued lawfulness of detention and ensures alternative placement options have been duly considered.
108	[illegible]	Placement in an immigration detention facility will be based on an assessment of the person's risk to the community. Community-based options may be used if the individual does not present unacceptable risks to the community. Individuals may be required to comply with various conditions while remaining in the community until a substantive immigration status outcome has been reached and/or they leave the country. Detention Review Committees are held monthly to review all cases in held detention to ensure the ongoing lawfulness and reasonableness of the initial decision to detain a person, by taking into account all the circumstances of the case, including adherence to legal obligations. This periodic review takes into account any changes in the client's circumstances that may impact on immigration pathways including returns and removal, to ensure the continued lawfulness of detention and ensures alternative placement options have been duly considered.
109	[illegible]	Under the Immigration Detention Facilities and Detainee Services Contract, the Detention Service Provider (Serco) must provide detainees with access to a variety of nutritious food and beverages that are sufficient in quantity, culturally appropriate, dietary specific (where required) and the preparation of which is compliant with all applicable food and health safety legislation. Upon reception, Serco provides detainees with clothing and footwear that is new, suited to the local conditions and their cultural background. Serco is responsible for replenishing a detainee's clothing and footwear as required. Serco is responsible for all cleaning services of the facilities on a regular basis and must ensure the safety and welfare of detainees, and all other people at the facility. To support a detainee to maintain their own personal hygiene, Serco allocate each detainee a starter pack of toiletries during the reception process. These supplies are replenished as needed. A number of programmes for detainees in immigration detention are run within, and external to, the immigration detention facilities and contribute to

		personal development and quality of life. These include activities such as cultural and lifestyle classes, sporting activities, educational services, including health and wellbeing, English language instruction, vocational, religious and instructive programmes or activities. Resources and equipment for self-education and recreation available at immigration detention facilities include computers, appropriate videos, art and craft supplies, sport and recreational facilities and equipment and amenities including a library with a variety of reading material in various languages. Quiet places for passive activities such as reading and contemplation are also available. IHMS provide integrated health care to detainees that includes health promotion, education and prevention programmes, nurse consultations, General Practitioner consultations, mental health services, medication supply and administration, dental services, optical services, complex and chronic disease management, women's health, diabetes support, child health services, referral to specialists as required and a 24 hours Health Advice Service via telephone.
110	Systematically inform detained migrants in writing, in a language they understand, of the reason for their detention, its duration, their right to have access to a lawyer, their right to promptly challenge their detention and their right to seek asylum;	On arrival at an IDF, detainees are informed as part of the induction process that they may seek legal advice. In addition, detainees are advised that they may receive visits from their legal representative and contact their legal representative electronically, by telephone and to send and receive correspondence electronically or via post. The Department informs detained migrants of the reason for their detention in a language they understand. In regional processing countries, the host government provides this service (supported by DIBP's capacity building activities.) General information in detention centres, such as induction processes, request forms and complaints forms are in different languages.
111	Ensure that all detained migrants are able to promptly contact their family, consular services and legal counsel;	The guiding principles for all detainees in relation to access to communication services in immigration detention facilities (IDFs) state that detainees will be treated fairly and reasonably within the law and that conditions of immigration detention will ensure the inherent dignity of the human person. For the provision of communication services in IDFs this means that detainees: are encouraged to maintain reasonable contact with their family, friends and community contacts; • are entitled to communicate with external scrutiny bodies including the Australian Human Rights Commission and the Commonwealth Ombudsman's Office; • will be informed during induction about accessing the telephone, facsimile, mail and photocopying services;

		• will be afforded the same level of privacy when communicating externally as they would have in the community. Neither the facilities and detainee services provider (FDSP) nor the Department may record, intercept, read, copy or otherwise listen to a detainee's communication without their explicit invitation. It is a legislative requirement of the *Australian Human Rights Commission Act 1986* that detainees can correspond with the Commission without their correspondence being opened; • will be given reasonable access to communication services unless it presents a serious safety or security concern; and • will have explained to them, in a language in which they are reasonably fluent, arrangements for access to all communication services, using an interpreter and translated documents where necessary. Australia is a party to the Vienna Convention on Consular Relations 1963 (the VCCR). Article 36 of the VCCR creates obligations for Australia to ensure that foreign consular officers have access to their nationals who are in immigration detention in Australia. Consistent with these obligations, at the time of their detention, all detainees are informed of their right to: • request consular access at any time; • receive consular access without delay; • refuse consular access at any time; and • change their decision on consular access at any time. On arrival at an IDF, detainees are informed as part of the induction process that they may seek legal advice. In addition, detainees are advised that they may receive visits from their legal representative and contact their legal representative electronically, by telephone and to send and receive correspondence electronically or via post. Detainees in IDFs can: • make personal telephone calls on communal telephones. Local and interstate calls can be made at no cost. International and calls to mobile phones are made at the detainee's own cost using phone cards; • purchase phone cards of varying denominations from the FDSP operated facility shop or canteen; • receive and send faxes irrespective of the destination, place of origin or time differences at no cost to themselves; • photocopy documents free of charge; • access computers and the internet, including email, subject to agreeing to 'Terms and Conditions of Computer and Internet Use'. Due to privacy requirements detainees do not receive

		incoming calls directly, but messages are passed on to Detainees with the callers details. There is also no limit on the number of letters that a detainee can receive or send at their own expense. Writing paper, envelopes and stamps are available for purchase through the facility shop. There are no restrictions placed around visiting third parties taking receipt of items to be mailed on behalf of detainees when they have been requested to do so. Restrictions to some communication services may apply to detainees held in border screening detention.
112	Develop comprehensive human rights training programmes for all staff who work in such centres; including to provide them with the ability to identify detainees exhibiting mental health problems.	The Detention Service Provider (Serco) has developed induction training for its staff, which includes training on human rights, cultural awareness, mental health awareness, abuse and trauma awareness, interacting with detainees and working with minors. Serco requires its staff to undertake the mental health awareness training prior to commencing work and undertake refresher courses on a regular basis. This training must cover identifying and responding to threatened, attempted and actual self-harm. In addition, Serco has procedures in place to identify and manage detainees who may be at risk of self-harm.
113	Improve available mental health services in detention, based on the principle of informed consent;	Mental health services to detainees in immigration detention are provided by a mental health team comprising of a mix of mental health professionals appropriate to the mental health needs of each facility. The mix is of this team may vary depending on the age group and gender mix at each facility.
114	Provide on-site interpreters in immigration detention facilities, at least for frequently spoken languages, so as to render health services and other services more accessible and appropriate for detainees lacking English language skills;	Interpreters are available onsite or by phone when required.
115	Adopt all necessary measures to ensure that stateless persons whose asylum claims are refused and refugees with adverse security or character assessments are not held in detention indefinitely, including by resorting to non-custodial alternatives to detention.	While stateless persons who present character or security risks may be detained, most stateless persons whose protection applications have been refused are able to live in the Australian community on a bridging visa or in community detention arrangements while their status is resolved either through departure from Australia or grant of a different visa. It should be noted that under s195A and s197AB of the Migration Act the Minister has the power to intervene in such cases. This power is non-compellable. Australia is a party to the UN Convention on relating to the Status of Stateless Persons and where a detainee has their identity confirmed as stateless, the Department would assess their case against the s195A guidelines. The length and conditions of detention, including the appropriateness of both the accommodation and the services provided are subject to regular review. In line with these values, placement in an immigration detention facility will be based on an assessment of the

		person's risk to the community. If the individual does not present unacceptable risks to the community, community-based options may be used. Individuals may be required to comply with various conditions while remaining in the community until a substantive immigration status outcome has been reached and/or they leave the country. Detention Review Committees are held monthly to review all cases in held detention to ensure the ongoing lawfulness and reasonableness of the initial decision to detain a person, by taking into account all the circumstances of the case, including adherence to legal obligations. This periodic review takes into account any changes in the client's circumstances that may impact on immigration pathways including returns and removal, to ensure the continued lawfulness of detention and ensures alternative placement options have been duly considered.
116	Quickly close down the RPCs in PNG and Nauru and terminate the offshore processing policy, in order to remedy the systemic human rights violations this policy creates.	The PNG and Australian Governments have made clear their commitment to closing the Manus RPC. The Government of PNG has indicated a preference for this to occur by 31 October 2017 and the Australian Government continues to support this objective. Decommissioning of the site commenced in December 2016 and will continue in line with residents moving from the RPC. Australia will continue to support a regional processing capacity in Nauru. It is a priority for all three Governments to secure appropriate and durable outcomes for all people in regional processing countries.
117	Immediately repatriate all children and families with children from RPCs to mainland Australia and place them in communities with appropriate child and family psychiatric care and appropriate support for their integration in the school and social systems.	It is Australian Government policy that no illegal maritime arrival will permanently settle in Australia and that all arrivals are subject to regional processing arrangements, including children and their families, single women and unaccompanied minors. Australia supports the Governments of Nauru and PNG to secure durable outcomes for all people subject to regional processing arrangements. The education of children in Nauru is the responsibility of the Government of Nauru; however, the Department is committed to supporting the delivery of quality education programmes. The Australian Government provides professional development to Government of Nauru teachers to assist with curriculum development, improvements to pedagogical practice and the implementation of the national quality school's standards framework. Mental health care and support is provided to transferees and refugees in Nauru by the Department's contracted health services provider (HSP), through a multi-disciplinary service, including general practitioners, mental health nurses, psychologists,

		occupational therapists, social workers and counsellors and visiting psychiatrists. Survivors or torture and trauma are referred to specialist torture and trauma counsellors. The Department has implemented an enhanced mental health strategy in Nauru to improve the provision of mental health services to transferees and refugees. The Strategy is based on a community mental health framework, which includes the establishment of a child, adolescent and family mental health team, as well as a community-based mental health team. Assertive mental health outreach is also provided by the HSP's mental health team at the Regional Processing Centre, with activities including: • mindfulness walking group, during which HSP practitioners observe social interactions and behaviours of residents; • education sessions; • joining select groups of residents during meal times at the RPCs, making observations through social interaction; • attending events at the request of residents, to enable interactions; and • participating in compound walk-throughs where residents may request time with HSP staff member or look to engage with the HSP staff through social interaction.
118	Find meaningful and timely resettlement options for all refugees in RPCs, while respecting the right to family unity. Any agreement regarding third. country resettlement must be meaningful in terms of numbers, timeliness and opportunities to rebuild one's life, taking into account particularly vulnerable migrants, and respect Australia's international humanitarian and human rights obligations. Refugees and migrants who cannot be quickly resettled in a foreign country must be repatriated without delay on Australian territory.	Since the Special Rapporteur's visit to Nauru, the Australian Prime Minister and Minister for Immigration and Border Protection have announced a resettlement option to the United States. Under the arrangement, the US is considering cases referred to its Refugee Admissions Program by the United Nations High Commissioner for Refugees. The priority is the resettlement of the most vulnerable refugees, with an initial focus on women, children and families. The orderly resettlement of refugees from regional processing countries will take time. Resettlement in the US is just one options for refugees in Nauru and PNG. Refugees can temporarily settle in Nauru for 20 years or permanently resettle in Cambodia. Refugees in PNG can settle permanently in PNG. Australia will continue discussions with other countries to expand options for the resettlement of refugees from regional processing countries.
119	Ensure the independent and systematic monitoring of all detention centres by independent and competent oversight mechanisms, so that they are all brought to the same standards. In order to foster accountability for human rights abuses, their reports should be immediately made available to the public.	Australian immigration detention centres have independent and competent oversight mechanisms in place, including the Commonwealth Ombudsman, the Australian Human Rights Commission (AHRC), the Australian Red Cross (ARC), the Australian National Audit Office (ANAO) and Comcare. The Commonwealth Ombudsman investigates

		complaints relating to the administrative processes of the Department, and as well matters of concern it identifies through its interaction with the Department. The AHRC is an independent statutory authority that investigates, conciliates and resolves alleged discrimination and breaches of human rights. The Department enjoys a robust, honest and healthy relationship with the AHRC. The ARC acts as humanitarian observers, monitoring the conditions of detention and the treatment of people within the detention network. The ANAO performs a vital oversight function for the government, providing assurance that government Departments and agencies are performing within legislative and policy boundaries. Comcare also provides external scrutiny of the Department's compliance with the *Work Health and Safety Act 2011* including s 19(1), which requires the Department to ensure, as far as is reasonably practicable, the health and safety of its employees. The Department values its relationships with these agencies as they allow the Department to continuously improve. Within the Department, the Detention Assurance Branch provides internal, independent review of detention-related matters. On 9 February 2017, the Government announced it will work towards ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) by December 2017. OPCAT ratification will provide additional, independent monitoring of places of detention, including immigration detention, under Australia's jurisdiction and control by a network of Australian inspectorates (called a National Preventive Mechanism), and the United Nations Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Commonwealth Ombudsman will be responsible for inspecting immigration detention centres under OPCAT. Australia's ratification of OPCAT will not apply to regional processing countries.
120	Ensure that reports of abuse in RPCs are properly investigated by an independent and competent oversight mechanism, and that persons found guilty held accountable.	Papua New Guinea and Nauru have both signed MOUs with Australia and, relevantly, provided their respective assurances that people taken to their jurisdictions by Australia will be treated with dignity and respect and in accordance with relevant human rights standards. While it is the responsibly of the Governments of PNG and Nauru to ensure access to justice and accountability, the Department also takes incident reporting and management in Regional Processing Centres very seriously. Matters involving alleged

		criminality are referred to Nauruan or Papua New Guinea law enforcement agencies for investigation as appropriate. First response to reported incidents in a RPC is the responsibility of contracted service providers. Service providers are required to manage incidents in accordance with contract standards, which vary based on the seriousness of the incident. Health and welfare supports are available to all alleged victims.
121	Allow the AHRC to inquire at will in offshore RPCs on the actions of Australian authorities and of service providers.	The Australian Government has not sought to prevent the Australian Human Rights Commission (AHRC) from commencing any inquiry into the actions of Australian authorities and of service providers. The AHRC is an independent body established by statute. The AHRC's governing statute does not provide for the AHRC to exercise its powers outside of Australia. The AHRC has publicly stated that it will inquire into complaints received from asylum seekers on Nauru and Papua New Guinea.
122	Ensure full and proper access to justice for all detainees, including a more accountable system for lodging complaints within detention centres.	Migrants, asylum seekers and refugees are able to access a range of private and community legal services. Consistent with the Migration Act, the Department provides detainees reasonable facilities for obtaining legal advice or representation either through private or pro bono legal services. The Australian Government also funds application assistance for the most vulnerable asylum seekers, and provides online application assistance through the Protection Application Information and Guides (PAIG), which are available in a range of community languages. Detainees are informed of their rights and are able to comment on or complain without hindrance or fear of reprisal about any matter relating to the conditions of detention to the service provider, its personnel and/or subcontractors, the Department, the Australian Human Rights Commission or the Commonwealth and Ombudsman. Material advising of the right to complain to the Australian Human Rights Commission and the Commonwealth Ombudsman is displayed prominently throughout detention facilities at all times and is also available to detainees on request.
123	Ensure that all detained persons who claim protection concerns are, without delay, adequately informed of their right to seek asylum, have access to registration of asylum claims and can communicate with UNHCR, lawyers and CSOs.	Under section 256 of the Migration Act, where a person is in immigration detention, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, give to him or her application forms for a visa or afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention. Detainees have access to landline telephones, mail and computers linked to the internet.
124	Ensure that migrants, asylum seekers and refugees,	Migrants, asylum seekers and refugees are able to

	whatever their status, have easy access to competent lawyers, free of charge when needed, in order to challenge any decision made that threatens their rights and freedoms, especially in expulsion, detention and asylum procedures.	access a range of private and community legal services. Consistent with the Migration Act, the Department provides detainees reasonable facilities for obtaining legal advice or representation either through private or pro bono legal services. The Australian Government also funds application assistance for the most vulnerable asylum seekers, and provides online application assistance through the Protection Application Information and Guides (PAIG), which are available in a range of community languages.
125	Simplify and encourage easy access of CSOs to detention centres in order to reinforce the information migrants need to make appropriate choices regarding their legal options.	Civil society organisations can access immigration detention facilities through the existing visits process, which is accessible on the DIBP website.
126	Ensure the detention appeal proceedings allow for a regular review of the merits of the detention, and not only its legality.	Detention Review Managers ensure the lawfulness and reasonableness of detention by reviewing detention decisions. The review is conducted to ensure the decision to detain is lawful focusing on identity issues, knowledge or reasonable suspicion that the person is an unlawful non-citizen. In addition, Detention Review Committees are held monthly to review all cases in held detention to ensure the ongoing lawfulness and reasonableness of the decision to detain a person, by taking into account all the circumstances of the case, including adherence to legal obligations. This periodic review takes into account any changes in the client's circumstances that may impact on immigration pathways including returns and removal, to ensure the continued lawfulness of detention and ensures alternative placement options have been duly considered. Part of ongoing review of individuals in detention includes a risk-based approach to the consideration of the appropriate placement and management of an individual while their status is being resolved. Placement in an immigration detention facility will be based on the assessment of a person's risk to the community and level of engagement in the status resolution process. If the individual does not present unacceptable risks to the community, community-based options may be used. Individuals may be required to comply with various conditions while remaining in the community until a substantive immigration status outcome has been reached and/or they leave the country. Immigration detention in an immigration detention centre will continue to be available for those who pose a risk to safety and security of the Australian community.
127	Provide access to basic services such as healthcare to everyone living in the Australia, regardless of their immigration status, in accordance with international human rights standards.	Australia's Multicultural Access and Equity Policy focuses on ensuring that Australian Government programs and services meet the needs of all Australians, regardless of their cultural and linguistic background. Humanitarian entrants settled in Australia

		are permanent residents and as such have access to Medicare and income support benefits as any other Australian citizen or permanent resident. HSS service providers are contracted by DSS to provide early practical support to refugees and humanitarian entrants to help them settle into the Australian community. The types of settlement services provided to refugees and humanitarian entrants generally include arrival reception and assistance, assistance with finding accommodation (short and long term), property induction; assistance to register with Centrelink, Medicare, health services, banks and schools, orientation to life in Australia, and linking with community and recreation programs. Access to the Australian universal health insurance scheme (Medicare) is governed by the *Health Insurance Act 1973*. Eligibility to Medicare is generally restricted to people who permanently reside in Australia and are Australian citizens, New Zealand citizens or permanent visa holders. However, the Government also provides access to Medicare for asylum seekers and refugees who hold specific temporary visas. Refugees and asylum seekers who are eligible for Medicare have access to the full range of medical services subsidised by Medicare. Applicants for permanent resident visas, who hold a bridging visa, are also entitled to access Medicare if they have either: a) a parent, spouse or child who is an Australian citizen or holder of a permanent visa; or b) authority to work. It is submitted that the above entitlements accord with the right to the enjoyment of the highest attainable standard of physical and mental health contained in Article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR). The UN Committee on Economic Social and Cultural Rights has stated that the right to health is not a right for each individual to be healthy, but is a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health. The Committee reports that the 'highest attainable standard of health takes into account the country's available resources. The Pharmaceutical Benefits Scheme (PBS) provides timely, reliable and affordable access to necessary medicines for Australians. The PBS is available to all Australian residents who hold a current Medicare card. Overseas visitors from countries with which Australia has a Reciprocal Health Care Agreement are also eligible to access the Scheme.
128	Implement "firewalls" between public services and immigration enforcement, thus offering better access	Exchange of information between government agencies is required to ensure that clients receive entitlements in

	to effective labour inspection, access to justice, and to other public services such as housing, healthcare, education, police and social services, for all migrants, regardless of status, without fear of detection, detention and deportation. This would also allow for better collection of disaggregated data by government agencies, especially on undocumented migrants.	accordance with government policy and program settings. With regard to labour inspection, implementation of a "firewall" between the Fair Work Ombudsman (FWO) and the Department of Immigration and Border Protection would be inconsistent with agreed protocols for information sharing between the two agencies. The agencies work collaboratively by sharing information, referring relevant matters and undertaking joint activities. For example, under Taskforce Cadena, the FWO and DIBP share intelligence and data to identify strategic targets with regard to contraventions of the *Fair Work Act 2009* and the Migration Act. This collaboration enhances the ability of both agencies to target and disrupt entities that seek to commit visa fraud and exploit foreign workers in Australia. On 4 October 2016, the Government announced the establishment of a cross-government Migrant Workers Taskforce to identify options for improvements in law, law enforcement and investigation, or other practical measures to more quickly identify and rectify cases of migrant worker exploitation. The FWO and the DIBP are members of the Taskforce. In October 2016, to support and encourage migrant workers to report workplace issues, the Taskforce announced that where temporary visa holders with a work entitlement attached to their visa may have been exploited (and provided they have reported their circumstances to the FWO), the DIBP will generally not cancel a visa, detain or remove those individuals from Australia.
129	Ensure respect by all service providers in on-shore and offshore detention facilities of the 2011 Guiding Principles on Business and Human Rights adopted by the Human Rights Council, which underscore as one of their foundational principles the corporate responsibility of business enterprises to respect human rights.	Detention services contracts generally stipulate that service providers must comply with all legislation of the Commonwealth or State or Territory in force, including the *Migration Act 1958*; *Human Rights and Equal Opportunity Commission Act 1986* and *Australian Human Rights Commission Act 1986*. The Detention Service Provider (Serco) must comply with, and ensure that all personnel comply with all laws including, but not limited to, those laws listed in the contract and any other government policies as notified by the Department of Immigration and Border Protection. The service provider must also comply with all of Australia's obligations under any international treaties, charters, covenants and agreements including: • International Covenant on Civil and Political Rights; • Convention Relating to the Status of Refugees; and • Convention on the Rights of the Child. Serco ensure that the detainee induction briefing includes all information relevant to detention, including how to access information from the Australian Human Rights Commission, the Commonwealth Ombudsman,

		the International Organisation for Migration and other international and regulatory bodies. Detainees are informed of their rights and are able to comment on or complain without hindrance or fear of reprisal about any matter relating to the conditions of detention to the service provider, its personnel and/or subcontractors, the Department, the Australian Human Rights Commission or the Commonwealth and Ombudsman. Material advising of the right to complain to the Australian Human Rights Commission and the Commonwealth and Ombudsman is displayed prominently throughout detention facilities at all times and is also available to detainees on request. The Department will endeavour to make its contractors aware of the UN's Guiding Principles.
130	Ensure an effective enforcement of laws prohibiting racist and xenophobic acts as well as hate speech and racially motivated violence against migrants and asylum seekers. Ensure that such acts are prosecuted and punished and that appropriate compensation is awarded to the victims.	It is important that Australia strikes the right balance between laws which protect social harmony and mutual respect, and the fundamental democratic value of freedom of speech. Australia's federal and state and territory anti-discrimination laws provide the legal frameworks to protect people from racial discrimination.
131	Strengthen the efforts to apply the legislation to combat direct or indirect discrimination with regard to the enjoyment of economic, social and cultural rights by migrants, refugees and asylum-seekers, including in access to private rental housing and the labour market.	The *Racial Discrimination Act 1975* plays an important role in protecting individuals from discrimination on the grounds of race, colour, descent or national or ethnic origin in any field of public life. Australia's *National Anti-Racism Strategy*, national Harmony Day and new multicultural statement *Multicultural Australia: united, strong, successful* all support Australia's *Racial Discrimination Act 1975*.